

THE INTERIM

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IN THIS ISSUE

ENVIRONMENTAL QUALITY COUNCIL	1
EDUCATION AND LOCAL GOVERNMENT COMMITTEE ..	2
LEGISLATIVE FISCAL DIVISION	2
ECONOMIC AFFAIRS COMMITTEE	3
QUALITY SCHOOLS COMMITTEE	4
CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE	4
MONTANA LEGISLATIVE REFERENCE CENTER	5
THE BACK PAGE	6
35 YEARS OF THE MONTANA ENVIRONMENTAL POLICY ACT	6
INTERIM CALENDAR	13

ENVIRONMENTAL QUALITY COUNCIL

Oil and gas subcommittee meets in Wyoming... The EQC subcommittee studying oil and gas issues continues to play to packed houses.

More than 70 people attended a late October meeting in Sheridan, Wyo., and many of them addressed the HB790 subcommittee during about five hours of public comment. A similar gathering took place last August in Havre.

In Sheridan, two advocates of the split estate law recently passed by the Wyoming Legislature addressed the panel. Laurie Goodman of the Landowners Association of Wyoming said the state actually modeled some of its bill after Montana's Surface Owner Damage and Disruption Compensation statute (82-10-501, MCA). But Wyoming mandated at least 30 days notice for drilling operations as well as a \$2,000 surface bond if the landowner and the mineral developer cannot reach a damage agreement.

Montana has a 10-day notice minimum and no bond in lieu of an agreement. Dave Galt of the Montana Petroleum Association and others said that current Montana law is adequate.

Residents of Montana and Wyoming testified for and against aspects of coal bed methane development, which is prevalent in the Powder River Basin.

The new Wyoming law also encourages mediation of disputes. Lucy Hansen of the Wyoming Agriculture & Natural Resource Mediation Program said mediation saves time and money.

On the second day of the meeting, the subcommittee toured several coal bed methane sites in the area.

The next meeting is scheduled for Dec. 8 and 9 in Sidney. For more information, contact Joe Kolman at (406) 444-9280 or jkolman@mt.gov. Or go to the panel's webpage at http://leg.state.mt.us/css/lepo/2005_2006/subcommittees/HB_790/default.asp

Fire study work group meets in November... The HJR 10 fire study work group met on Nov. 16 to continue its review of fire-related statutes, to discuss wildland-urban interface codes, and to further refine the state fire policy that it will propose to the Assigned Studies subcommittee.

The group agreed that new fire protection guidelines for wildland interface development in Montana needed to be developed. The previous guidelines, written as part of a 1993 legislative resolution, are outdated. Other guidelines, such as the International Urban Wildland Interface Code and the National Fire Protection Association codes, contain useful components, but are not tailored to Montana's unique needs. With the Department of Natural Resources and Conservation in the lead, members of the HJR 10 work group, as well as other interested participants, will undertake development of new Montana-specific guidelines as part of a separate process, outside of the HJR 10 study.

THE INTERIM

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THE INTERIM is a monthly newsletter that reports on the interim activities of legislative committees, including the Legislative Council, the Environmental Quality Council, the Legislative Finance Committee, the Legislative Audit Committee, and interim legislative committees and subcommittees staffed by the Legislative Services Division. Information about the committees, including meeting schedules, agendas, and reports, is found at <http://www.leg.state.mt.us>. Follow the "Committees" link or the "Interims" link to the relevant committee. The newsletter is posted on the legislative branch website on the first of each month (follow the "Publications" link).

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Division***

Creating a state fire policy that the group will propose be codified has been an ongoing goal of those involved in the HJR 10 study. The series of policy statements will continue to be reviewed at each work group meeting and will be presented to the subcommittee.

The group will meet next at 10 a.m. on Jan. 5 in the Capitol building. If you have any questions about the study or the work group, contact Leanne Kurtz, study staff, at (406) 444-3593 or lekurtz@mt.gov.

Environmental Quality Council to meet in January...The Environmental Quality Council and its subcommittees will meet Jan. 26-27. For more information, contact Todd Everts at (406) 444-3747 or teverts@mt.gov or Krista Lee Evans at (406) 444-1640 or kevas@mt.gov

EDUCATION AND LOCAL GOVERNMENT COMMITTEE

Subcommittees of Education and Local Government Committee meet in December...The Postsecondary Education Policy and Budget and Local Government subcommittees of the Education and Local Government Interim Committee met on Thursday, Dec. 1. Coverage of those meetings will be in the January issue of *The Interim*.

Subcommittee to survey planning offices...The Local Government subcommittee has been hearing from representatives of local planning offices that their resources are stretched too thin and that many jurisdictions are having a tough time keeping up with their daily demands, leaving little or no time for long-range planning or to respond to changes brought about by SB 116 (amendments to the Subdivision and Platting Act) and other legislative actions. There is also a lack of technical assistance provided to planning offices as they grapple with changing laws and difficult development situations. To get a better feel for how local planning offices are staffed, the fees they charge for various types of review, and how they go about long-range planning, the subcommittee has teamed up with the Montana Association of Planners to conduct a survey of local government planning offices throughout the state. The survey can be completed online or by other means and can be viewed and completed at <http://leg.mt.gov/plannerssurvey.htm>. The results of the survey will be presented to the subcommittee at its February meeting.

For more information about ELG, the Local Government subcommittee, or the survey of planners, contact Leanne Kurtz at (406) 444-3593 or lekurtz@mt.gov.

LEGISLATIVE FISCAL DIVISION

LFC to Meet Dec. 6 and 7...The Legislative Finance Committee will meet Tuesday and Wednesday, Dec. 6 and 7 in Room 137 of the state Capitol, beginning at 1 p.m. on Tuesday and at 8 a.m. on Wednesday. The committee was scheduled to meet Dec. 8 and 9. The day-and-a-half meeting will include the following topics:

- Corrections facility expansion plans, including what was funded, what was intended, what is the department plan, what is the difference, and justification of the difference;
- Department of Corrections update on prison population projections/fiscal impact;
- Department of Public Health and Human Services programs, including Medicare Part D implementation, a budget status report, the HIFA waiver, and CHIP contracts;
- Information Technology Management update, including a discussion of a performance audit by the Legislative Audit Division on "Enterprise IT Management";
- pandemic influenza preparedness;
- general fund update including a projection through the 2007 biennium;
- school funding study update;
- HJR 42 study of unfunded liability of state pension plans;
- Montana State Hospital budget issues;
- energy cost assistance programs (low-income energy assistance program (LIEAP) and others);
- energy price increases and the impacts on state agency budgets; and
- updates on legislative interim committee activities.

The agenda and reports are available on the Legislative Fiscal Division webpage at <http://www.leg.mt.gov/css/fiscal/lfc.asp>. For more information about the committee contact Clayton Schenck at cschenck@mt.gov or (406) 444-2986.

RIT Subcommittee Meeting Dec. 5...The LFC Resource Indemnity Trust subcommittee is scheduled to meet on Monday, Dec. 5 at 9 a.m. in Room 102 of the Capitol. The focus of this meeting is to obtain program information on the thirty-five programs funded with RIT interest or the tax imposed under 15-38-106, MCA. The subcommittee will use the RIT worksheet to evaluate the relationship between program activities and the funding source to establish a priority ranking of the programs. The

March meeting will focus on the funding of the priorities and identifying statutes requiring change. The RIT worksheet and the agenda can be found at <http://www.leg.mt.gov/css/fiscal/default.asp>. The subcommittee is chaired by Rep. Rick Ripley and staffed by Barbara Smith, LFD. For more information, contact Smith at (406) 444-5347 or basmith@mt.gov.

ECONOMIC AFFAIRS COMMITTEE

Who has your number?...The seemingly ubiquitous use of social security numbers cropped up during the discussion of identity theft at the Oct. 28 meeting of the Economic Affairs Interim Committee. Having a person's name and social security number, a fraud artist can wreak havoc in the person's life by obtaining credit cards or engaging in a variety of other forms of identity theft. In 1999, the Legislature amended motor vehicle licensing laws to prohibit the use of a licensee's social security number as the driver's license number unless specifically requested. Before that change occurred, social security numbers were common on drivers' licenses.¹ The committee learned that social security numbers are also used for state health insurance numbers. The education on the use of social security numbers is part of the review of identity theft prevention and mitigation measures called for by SJR 38.

Other identity theft-related matters raised at the meeting included:

- holding accountable all entities that gather personal information;
- evaluating whether to go beyond fraud alerts allowed by federal law to other measures, such as security alerts or credit freezes as a way of blocking illegal access to credit;
- determining how much it would cost to educate consumers, law enforcement officers, and prosecutors about how to deal with identity theft;
- contending with online identity theft;
- avoiding inconsistent treatment of interstate businesses;
- recognizing that identity theft is harmful to both businesses and individuals;
- balancing an individual's protection with maintaining business operations;

- determining appropriate penalties for security breaches; and
- determining whether counties that participate in the state computer network are ensuring data protection.

A work group is meeting Dec. 9 and on Jan. 9 to develop recommendations on security alerts and credit freezes as well as other proposals for consideration at the committee's Feb. 10 meeting.

Other committee business...Former workers' compensation judge Mike McCarter discussed eight pending court cases, the resolution of which could end up costing millions of dollars in retroactive workers' comp claims, affecting thousands of claimants and as many as 640 insurers. McCarter said that some of the cases challenge the constitutionality of certain provisions in state law and other cases relate to underpayments made to claimants or the timing of payments. McCarter pointed out that retroactive costs are difficult to calculate because benefit entitlements may have no specific end point.

Keith Kelly, commissioner of labor, presented an overview of recent Department of Labor and Industry activities, including streamlined electronic applications for professional and occupational licensing, approval from the federal government of a waiver that allows the state plan for workforce training to operate as a single area, and changes in the way workers' compensation medical fee schedules are determined.

Subcommittee appointed for HJR 35 study...Rep. Jim Keane, committee chair, appointed a subcommittee of Sen. Vicki Cocchiarella and Reps. Mike Milburn and Tom McGillvray to review the purpose of professional and occupational licensing boards and how licensing fees are allocated as part of the SJR 35 study of professional and occupational licensing boards. The subcommittee's first meeting will probably be in January.

Committee prods governor to implement investment law...In the ongoing review of the stalled implementation of SB 133, the Montana Equity Capital Investment Act, the committee heard from several people, including venture capitalists Jon Marchi, chair of Big Sky Airlines and of the Glacier Venture Fund, and Brian O'Keefe of AA Capital Partners, Inc. Both noted that a delay in implementing the act could mean lost business in Montana. In a letter to the committee, Gov. Brian Schweitzer wrote that he had two concerns about SB 133: its constitutionality and lack of funding. A free conference committee on HB 2 removed the funding to implement SB 133 in the waning days of the 2005 legislative session. The Economic Affairs Committee disputed both concerns and voted to send a second letter to the governor, urging further consideration and emphasizing

¹Following the Oct. 28 meeting, a work group on SJR 38 learned that Montana's Motor Vehicle Division no longer allows social security numbers on any drivers' licenses, including commercial drivers' licenses, because of new federal laws limiting the display of social security numbers. Anyone can get a new driver's license number before the renewal date for a \$10 replacement fee.

the committee's willingness to work with the governor on the issue.

Question raised about implementation of development bill...Implementation of the Big Sky Economic Development Fund raised a red flag for Rep. Mike Milburn, who questioned whether the Department of Commerce was trying to insert into the grant-making application process a requirement to serve a certain number of employees. Andy Poole from the Department of Commerce assured the committee that there would be no requirements related to numbers of employees. The House of Representatives had stripped related requirements from HB 249 during floor debate.

Committee scheduled to meet in February...The next meeting of the Economic Affairs Committee will be Feb. 10 in Room 102 of the Capitol. An agenda will be available in January. For more information contact committee staff Pat Murdo at (406) 444-3594 or pmurdo@mt.gov or visit the committee's webpage.

QUALITY SCHOOLS COMMITTEE

Committee continues work on new school funding proposal...The Quality Schools Interim Committee met on Oct. 17 and 24 and Nov. 1-2 to finish work on eight components of a proposed new school funding formula. At the November meeting, the committee made final decisions on the accredited program component, the per-student component, classroom count, the operations and maintenance component, at-risk funding, and health insurance. Among the more notable decisions were:

- increases in the accredited program component for professional development, health insurance, and salaries;
- an increase in the operations and maintenance component based on square footage;
- inclusion of school employees in the state employees health insurance program; and
- creation of a social and educational wellness index for each school district to determine additional funding to districts for at-risk students.

The committee requested staff to draft legislation to implement the new school funding formula.

Committee discusses proposed legislation...The committee met on Nov. 18 to review the draft legislation implementing the new school funding formula. Because of the large number of people attending the meeting, the committee made arrangements for the public to watch the committee's proceedings on television sets in two other

meeting rooms in the Capitol.

The health insurance proposal was drafted separately to facilitate review of that proposal, but it will be included as part of the final school funding bill. Greg Petesch and Eddy McClure of the Legislative Services Division discussed the provisions of the two bill drafts and indicated those places in the bills where committee

decisions were still required. The committee then heard two hours of public comment.

After public comment, committee members discussed the proposed legislation for over two hours. There was disagreement over whether the legislation should be considered in a special legislative session or in the regular legislative session in 2007. Sen. Ryan suggested that the bill be considered during a special session but that it have a delayed effective date of July 1, 2007, to give more time to work on the bill and make any necessary changes in the 2007 legislative session. In addition, he said the committee should recommend that the Legislature in special session appropriate money for the 2006-07 school year to help schools "bridge the gap" until July 1, 2007. Other members of the committee did not believe the bill was ready for consideration in a special session. After much deliberation, the committee decided to put the bill out for public comment and to meet on Dec. 5 to consider revisions to the legislation.

For more information about the committee, contact Connie Erickson at (406) 444-3078 or cerickson@mt.gov.

CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

Next meeting in January...The Children, Families, Health and Human Services Committee will meet Jan. 26 and 27 in Helena. The Committee will concentrate on children's mental health and issues and options for the SJR 41 study on mental health crisis response. Representatives of the Child and Family Services Division will discuss workload, training, licensure and standards, accountability and complaint processes, prevention efforts, and legal issues related to child protective services. An agenda for the meeting will be available in early January.

Training opportunity on January 25...The committee will host a training session on Helping Low-Income Families Succeed. A group of legislators, including Sen. Trudi Schmidt and Reps. Mary Caferro, Bill Warden, and Christine Kaufmann, developed the concept after attending a National Conference State Legislatures conference in Chicago. The training session is tentatively scheduled for Jan. 25. Mary Fairchild from NCSL will provide technical assistance and lunch. Topics that the legislators identified to be covered in the training include asset building, such as individual development accounts; financial skill building; and access to lending and housing opportunities. All legislators will be invited and interim committees are being asked to sponsor their respective members. More information about the

training will be in the January issue of *The Interim*.

Ways to Participate...Anyone who wants to participate in the committee's activities should contact Susan Byorth Fox at (406) 444-3597. Persons who want to be on the interested persons list may sign up for electronic notices on the committee's webpage or contact Fong Hom at (406) 444-0502 to be placed on the hard copy mailing list.

MONTANA LEGISLATIVE REFERENCE CENTER

An early Christmas gift from the legislative library...'Tis the season for sleigh rides, twinkle lights, sugar cookies, and most joyous of all...Internet research!

We all know there's a ton of great stuff on the Internet. But who has time to wade through it all to find the right information? Well, permit me, dear Montana legislators, to point out a few online sites that I think will be extremely valuable to you.

TrendTRACK State Legislation Database: <http://thomas.trendtrack.com/texis/tt/search/search.html>

Through InSession, the TrendTRACK Company provides three ways to research state legislation of importance - or simply of interest - to you. Information displayed in InSession's legislative search results comes directly from the state legislature(s). InSession seeks out and combines key facts about targeted bills and displays them in a format that makes it easier to stay informed and up to date. Instead of a list of hits (bills) that have the search term(s) in their text, InSession provides a broad composite overview of each bill: bill title, author, summary (where available) and the bill's latest status. In addition, the InSession service provides links to the latest version of each bill on each state's site, the full status page of each bill, the author's legislative home page, along with links to the respective state legislature and each legislative chamber's home page. The information for each bill is standardized to the greatest extent possible from one state to another. TrendTRACK crawls state and Congressional legislative sites nightly to keep search text results fresh.

GPO Access: <http://www.gpoaccess.gov>

GPO Access is a service of the U.S. Government Printing Office that provides free electronic access to an extensive library of information produced by the federal government. The information on this site is the official, published version. Important resources on this site include the Federal Register, the Code of Federal Regulations, and a list of federal government resources organized by topic.

State and Local Government on the Net: <http://www.statelocalgov.net>

A directory of official state, county, and city government websites. You can search by jurisdiction or by

topic. Individual state listings also include state government news that is updated hourly. Although the site is yet not

complete, it is a helpful first stop for state-specific information.

Thomson Findlaw: <http://www.findlaw.com>

Findlaw resources include free case law, legal news, newsletters, message boards, service directories, and legal search tools and links. Use the section for "Legal Professionals" to find links organized by jurisdiction, subject matter, or material type.

Law Librarian's Society of Washington D.C. Legislative Sourcebook: <http://www.lldc.org/sourcebook/state-leg.htm>

This great resource, among other things, provides links and phone numbers for legislative services offices, legislative libraries, and other sources of information.

Census Bureau: <http://www.census.gov/govs/www>

Numbers, numbers, numbers. Need some statistics to back up your proposals? This is a great source for statistics on government finances. If you are not sure which agency might track statistics on your topic, start here: http://www.firstgov.gov/Topics/Reference_Shelf/Data.shtml.

National Conference of Commissioners on Uniform State Laws: <http://www.nccusl.org/>

The NCCUSL Website is clean, easy-to-use, and provides links to a great deal of information on uniform laws.

And in Montana:

Bills: <http://www.leg.state.mt.us/css/bills/default.asp>

Code: http://www.leg.state.mt.us/css/mtcode_const/default.asp

Supreme Court decisions: <http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-9484>

Administrative Rules: <http://arm.sos.state.mt.us>

Attorney General Opinions: <http://doj.state.mt.us/resources/opinions.asp>

Executive Orders: <http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-2660>

Election information: <http://www.sos.state.mt.us/css/ELB/Contents.asp>

If you have any questions regarding Internet research (or any other kind), please feel free to give your Legislative Librarian a call. Lisa Mecklenberg Jackson, 444-2957, ljackson@mt.gov. Christmas gifts optional.

THE BACK PAGE

35 YEARS OF THE MONTANA ENVIRONMENTAL POLICY ACT

By Todd Everts
Legislative Environmental Analyst

INTRODUCTION

With 2006 almost here, I thought it would be appropriate for this Back Page article to take a 35-year retrospective look at one of Montana's most celebrated and controversial environmental laws--the Montana Environmental Policy Act (MEPA).

As a 14-year staff member of the Environmental Quality Council (EQC), a bipartisan body of legislative members, public members, and a Governor's representative that was created by MEPA in 1971, I have had a front row seat in a surreal MEPA Broadway show that could easily be entitled "Cats Fighting--Not a Musical". MEPA, the cornerstone of a series of environmental laws enacted in the early 1970s, has been the focal point in a magnetic vortex of swirling environmental and natural resource policy debates over its 35-year history. Whatever perspective you may have regarding MEPA, you cannot say that it has been a boring ride over the years. The ride may have been passionate, electrifying, contentious, and perhaps frustrating, but never boring.

In organizing this MEPA retrospective interim article, I thought I would take a shot at addressing some of the most common MEPA questions that legislators have asked me throughout my tenure.¹ Those questions include:

- What is the purpose of MEPA?
- Why did Montanans decide to enact MEPA?
- How does MEPA work and what is the environmental review process?
- How do state agencies involve the public in MEPA decisions?
- How many environmental reviews have been done and which state agencies conduct the most MEPA reviews?
- How has the Legislature dealt with MEPA since its enactment?
- How have the Montana courts interpreted MEPA over the years?
- What are the costs and benefits of MEPA?
- Is the MEPA process timely and efficient?
- Does the MEPA process result in better-informed

decisions?

- What does the future hold for MEPA?

WHAT IS THE PURPOSE OF MEPA?

The purpose of MEPA is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, and to enrich the understanding of the ecological systems and natural resources important to the state (75-1-102(2), MCA).

Legislative amendments in 2003 to MEPA's purpose statement noted that the Montana Legislature, "mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act" (75-1-102(1), MCA). MEPA is procedural, and it is the Legislature's intent that the requirements of MEPA provide for adequate review of state actions in order to ensure that environmental attributes are fully considered (75-1-102(1), MCA).

MEPA was originally patterned after the National Environmental Policy Act of 1969 (NEPA) and includes three distinct parts. Part 1 is the "spirit" of MEPA. Part 1 establishes Montana's environmental policy. It requires state government to coordinate state plans, functions, and resources to achieve various environmental, economic, and social goals. Part 1 has no legal requirements, but the policy and purpose provide guidance in interpreting and applying the statute.

Part 2 is the "letter of the law". Part 2 requires state agencies to carry out the policies in Part 1 through the use of a systematic, interdisciplinary analysis of state actions that have an impact on the human environment.

Part 3 of MEPA establishes the Environmental Quality Council (EQC) and outlines the EQC's authority and responsibilities.

To truly understand MEPA's purpose, a brief review of the environmental, public participation, and right-to-know provisions of Montana's 1972 Constitution is necessary. The Legislature enacted MEPA in the spring of 1971 just prior to the Constitutional Convention, which started in November of 1971. The new Constitution was subsequently ratified by Montanans in June of 1972. The language of MEPA is, to some extent, reflected in the Constitution. The noteworthy constitutional provisions include:

Article II, section 3. Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting

¹ Obviously, a treatise could be written in response to these questions. Remember that this is only an Interim article, and my attempt here is to illuminate and inform in a very limited amount of space, which may result in oversimplification and unintended omissions--all of which I take sole responsibility for.

property, and seeking their safety, health and happiness in all lawful ways. *In enjoying these rights, all persons recognize corresponding responsibilities.* (emphasis added)

Article II, section 8. Right of participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

Article II, section 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Article IX, section 1. Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

The purpose of these constitutional provisions mirrors, and is intertwined with, the underlying purposes of MEPA. If implemented correctly, MEPA should facilitate the ability of state agencies to make better decisions. Better decisions should be balanced decisions. Balanced decisions maintain Montana's clean and healthful environment without compromising the ability of people to pursue their livelihoods as enumerated in MEPA and the Constitution. Better decisions should be accountable decisions. Accountable decisions, as required in MEPA, clearly explain the agency's reasons for selecting a particular course of action. Better decisions are made with public participation. Montana's Constitution mandates open government--people have the right to participate in the decisions made by their government. MEPA requires agencies to open government decisions for public scrutiny. The Montana Constitution also recognizes that people have the responsibility to participate in decisions that may affect them.

During an extremely comprehensive 1999-2000 interim study² on MEPA, the EQC noted that MEPA's very core, the policy and purpose of MEPA, is to foster:

- informed state government decisions;

- accountable and open state government decisions;
- balanced state government decisions; and
- ultimately, better state government decisions.

WHY DID MONTANANS DECIDE TO ENACT MEPA?

Backed by a very broad and unanimous coalition of interests (Table 1), MEPA was enacted in 1971 by a Republican House (99-0), a Democratically controlled Senate (51-1), and a Democrat in the Governor's Office. The legislation was sponsored by George Darrow, a Republican representative and petroleum engineer from Billings. Although the legislative record is sparse in detail, it reflects some of the reasons why MEPA was enacted. Selective statements from the legislative record include:

- MEPA "states the responsibility of the state".
- MEPA spells out that "each citizen is entitled to a healthy environment".
- "The intent of the bill is to establish a working partnership between the Executive and Legislative Branch of state government concerning the protection of the environment."
- MEPA "would coordinate the environmental facts of the state".
- "Montana's productive age populace is leaving the state for employment in other states, and if we wanted to keep taxpayers in the state, she suggested passage of HB 66 (MEPA)."
- "A major conservation challenge today is to achieve needed development and use of our natural resources while concurrently protecting and enhancing the quality of our environment."
- The sponsor of this bill "legislates foreknowledge".
- MEPA "seeks that often elusive middle ground between purely preservationist philosophy and purely exploitive philosophy, and indeed we must soon find that middle ground".
- MEPA will "establish a unified state policy pertaining to development and preservation of our environment".
- "As we guide Montana's development, we must use all of the scientific, technological, and sociological expertise available to us. This is our responsibility . . . We must avoid creating emotionally explosive situations that have occurred in the past and, indeed, are present right now in some of our communities . . . We must establish a state policy for the environment."
- "Include people in the decisionmaking."
- MEPA is "a master plan for the enhancement of our environment and promulgation of our economic productivity".
- MEPA "commits the state, through its agencies, to consider the environmental consequences of its actions".
- MEPA "says that Montana should continue to be a wonderful place to live and that development of its

² Environmental Quality Council, *Improving the Montana Environmental Policy Act (MEPA) Process*, Senate Joint Resolution No. 18, Final Report to the 57th Legislature of the State of Montana, (November 2000).

resources should be done in such a manner that quality of life will be assured to those who follow".

Unfortunately, the legislative record does not include transcripts from the floor debates in the House or the Senate. The votes are the only indicator of MEPA's support in those debates.

MEPA was one of several environmental bills considered by the 1971 Legislature. A competing bill--the Montana Environmental Protection Act--would have declared that a public trust exists in the natural resources of this state and that those natural resources should be protected from pollution, impairment, or destruction. To enforce this trust, the Protection Act would have allowed anyone, including nonresidents, to sue the state for failure to perform any legal duty concerning the protection of the air, water, soil and biota, and other natural resources from pollution, impairment, or destruction.

The Protection Act generated public controversy. The votes both in committee and on the floor mirrored the political realities that each bill had endured. The Protection Act received an adverse committee report with a 6 to 5 do not pass vote. When brought up on second reading in the House, the Protection Act was killed by a 49 to 48 vote. In contrast to the Protection Act's much-contested demise, MEPA sailed through the Legislature and on to the Governor's desk.

MEPA's almost unanimous bipartisan approval would, on its face, appear to have reflected a true consensus on the direction of the state's environmental policy. However, at the end of the 1971 regular session, MEPA's \$250,000 appropriation was removed from the state budget, leaving Montana with an environmental policy but no means to implement it. Later, during a second special legislative session in the summer of 1971 and after much debate, the MEPA appropriation was restored, but at a lower level--\$95,000. The battle over MEPA's funding indicates some political division surrounding its enactment that was not reflected in the votes on the House and Senate floors.

Table 1: Support or Opposition to MEPA During House and Senate Committee Hearings, 1971

	Support	Oppose
Ted Schwinden, Commissioner of State Lands	X	
R.W. Beehaw, Board of Natural Resources	X	
John Anderson, Executive Officer of the Department of Health	X	
Winton Weydemeyer, Montana Conservation Council	X	

Zoe Gerhart, Citizen	X	
Dennis Meehan, Citizen	X	
Wilson Clark, Professor at Eastern Montana College, Billings/Yellowstone Environmental Council	X	
Jan Rickey, Citizen	X	
Polly Percale, Assistant Professor at Eastern Montana College	X	
Ted Reineke, Eastern Montana College Wilderness Club	X	
Chris Field, Montana Scientist Committee for Public Information	X	
Marilyn Templeton, Gals Against Smog and Pollution (GASP)	X	
Cecil Garland, Montana Wilderness Society	X	
Robert Holding, Montana Wood Products Association	X	
Dorothy Eck, League of Women Voters	X	
Robert Fischer, Montana Chamber of Commerce	X	
Ben Havdahl, Petroleum Industry, Rocky Mountain Oil and Gas Association, Montana Petroleum Association	X	
Don Boden, Citizen	X	
Joe Halterman, Good Medicine Ranch	X	
Calvin Ryder, Citizen	X	
Gordon Whirry, Bozeman Environmental Task Force	X	
R.E. Tunnickliff, American Association of University Women	X	
Kirk Dewey, Montana Council of Churches	X	
Pat Calcaterra and Margaret Adams, Montana Sierra Club	X	
Don Aldrich, Montana Wildlife Association	X	
David Cameron, Professor at Montana State University	X	
Mons Teigen, Montana Stockgrowers	X	
Jim Posowitz, State of Montana Fish and Game Commission	X	
Frank Griffin, Southwestern Miners Association	X	

Source: House and Senate Committee Minutes, 1971.

HOW DOES MEPA WORK AND WHAT IS THE ENVIRONMENTAL REVIEW PROCESS?

According to MEPA's sponsor, George Darrow, MEPA requires state agencies to think through their actions before acting. MEPA provides a process that should help ensure that permitting and other agency decisions that might affect the human environment are informed decisions--informed in the sense that the consequences of the decisions are understood, reasonable alternatives are evaluated, and the public's concerns are known.

MEPA requires state agencies to conduct thorough, honest, unbiased, and scientifically based full disclosure of all relevant facts concerning impacts on the human environment that may result from agency actions. This is accomplished through a systematic and interdisciplinary analysis that ensures the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking. This analysis usually takes the form of a categorical exclusion (CE), an environmental assessment (EA), or an environmental impact statement (EIS).

Before making a decision to implement an action that might affect the human environment, MEPA generally requires the agency to generate and organize information, in the EA or EIS, that at a minimum:

- describes the need for the action or the agency's proposal (purpose and need);
- explains the agency's intended action (proposed action);
- discusses other possible options to the proposed action (alternatives);
- analyzes the potential consequences of pursuing one alternative or another in response to the proposed action (impacts to the human environment); and
- discusses specific procedures for alleviating or minimizing adverse consequences associated with the proposed actions (mitigation).

HOW DO STATE AGENCIES INVOLVE THE PUBLIC IN MEPA DECISIONS?

MEPA compels state agencies to involve the public through each step of the decisionmaking process. This is accomplished by:

- telling the public that an agency action is pending;
- seeking preliminary comments on the purpose and need for the pending action (scoping);
- preparing an environmental review (CE, EA, or EIS) that describes and discloses the impacts of the proposed action and evaluates reasonable alternatives and mitigation measures;
- requesting and evaluating public comments about the environmental review; and
- informing the public of the agency's decision and the justification for that decision.

The level of public participation is dependent on what type of

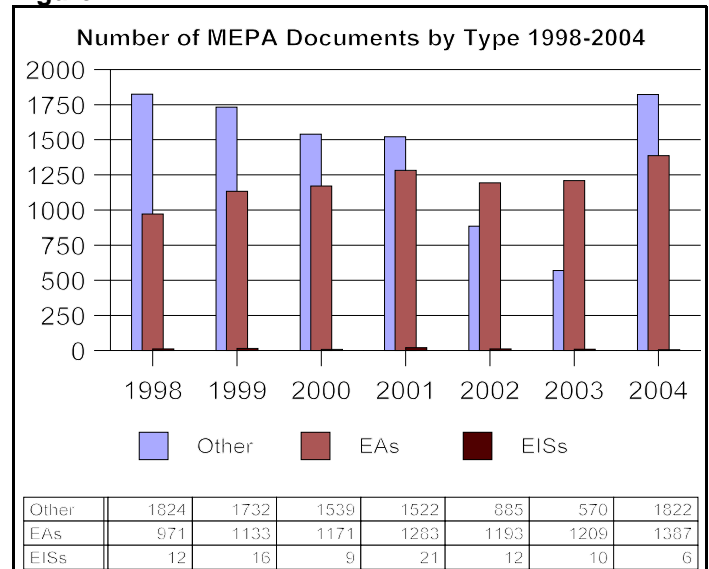
environmental review the agency is conducting.

HOW MANY ENVIRONMENTAL REVIEWS HAVE BEEN DONE AND WHICH STATE AGENCIES CONDUCT THE MOST REVIEWS?³

How many MEPA documents have been produced since MEPA's enactment in 1971? This is a question that I get asked a lot, but it is a tough question to answer with any certainty. Montana state agencies are required to send MEPA documents to the EQC, but not all MEPA documents that have been prepared have been received by the EQC.⁴ From October 26, 1971, through November 9, 2005, the EQC has logged 39,000 MEPA documents into the EQC MEPA database. Since 1971, state agencies have produced 392 EISs and 35,664 CEs and EAs.

The information in Figure 1 shows the type of MEPA documents that were reported to the EQC for the past 7 calendar years and further separates them into three categories (EIS, EA, and other).

Figure 1



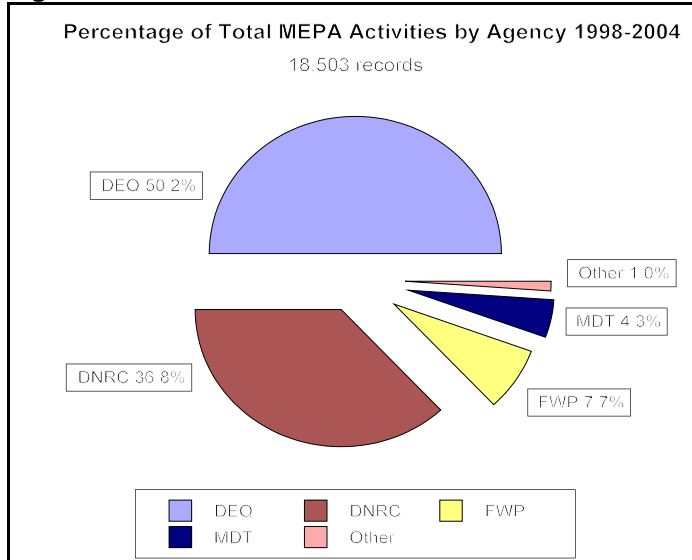
The information indicates that the number of MEPA documents reported to the EQC has ranged from 1,700 to 2,700 a year. What agencies conduct the most MEPA

³ I want to thank Maureen Theisen for all of her time and effort in teasing these numbers out of the EQC MEPA database and for generating the graphs in this article.

⁴ What are the "MEPA documents" reported to and logged into the EQC database? Documents prepared by agencies conducting an environmental review of proposed agency actions take many forms depending on the nature of the proposed action. The type of documents submitted to and logged into the EQC database include environmental assessment checklists, preliminary environmental reviews, categorical exclusions, environmental assessments, draft or final environmental impact statements, records of decisions, public notices, and a historic laundry list of other administrative MEPA decision statements that some agencies have reported over the years. MEPA activities that are submitted to the EQC are logged into the EQC database by the date on which they are received.

reviews? The answer to this question, based on the number of MEPA documents submitted to the EQC between 1998 and 2004, is shown in Figure 2. The chart shows that four state agencies⁵ accounted for 99% of the total MEPA document activity between 1998 and 2004, with the DEQ accounting for over half, or 50.2%, of the total.

Figure 2



HOW HAS THE LEGISLATURE DEALT WITH MEPA SINCE ITS ENACTMENT?

Since MEPA's enactment in 1971, successive Legislatures have struggled to determine the role of MEPA in directing state environmental policy. Seventy-three pieces of legislation have been introduced that have proposed to modify or study MEPA in some way. Forty-two of those bills have been enacted. Up until 2001, proposed legislation, ranging from significantly limiting the scope of MEPA to significantly expanding MEPA's breadth and influence, was frequently introduced and subsequently killed. In 2001, the Legislature made some significant changes to MEPA. A closer look at the legislative history reveals some interesting trends and highlights.

The Legislature has introduced 22 bills that specifically involved or affected the EQC. The bills that have been enacted over time have significantly increased the statutory responsibilities of the EQC. The trend has been to give the EQC additional specific and general agency oversight functions.

The Legislature has introduced 15 bills over a 35-year period that attempted to exempt specific activities from MEPA review. Twelve out of the 15 bills passed, creating 13

statutory exemptions. Eight out of the 13 statutory exemptions are for specific land management activities.

Juxtaposed with the exemptions described above, three bills were enacted that clarified that translocation or introduction of fish species, Montana University System land transactions, and Department of Fish, Wildlife, and Parks management plans are specifically subject to MEPA review.

Six bills passed by the Legislature impact MEPA litigation issues. As a result of these bills, the Legislature over time has made it tougher for a MEPA plaintiff both to litigate a

MEPA case and to win a MEPA case against a state agency.

In 1995, the Legislature enacted Senate Bill No. 231 that clarified that it is the state's policy under MEPA to protect the right to use and enjoy private property free of undue government regulation. MEPA had always required an economic and social impact analysis, but Senate Bill No. 231 further specified that when agencies conduct that analysis, regulatory impacts of private property rights and alternatives must be considered.

The watershed year of legislative changes to MEPA occurred during the 2001 legislative session. Of the nine bills affecting MEPA that were introduced during the 2001 legislative session, eight bills were enacted. Senate Bill No. 377 and House Bill No. 473 and 459 were perhaps the most significant MEPA bills enacted during the session.

Senate Bill No. 377 established time limits and procedures for conducting environmental reviews; it defined specific terms used in MEPA; it required that legal challenges to actions under MEPA may be brought only in District Court or federal court within 60 days of a final agency action; and it provided an exception to the permitting time limits if Board review of certain agency decisions is requested.

House Bill No. 473 clarified a long-standing and controversial issue--is MEPA procedural or is it substantive? That is to say, does MEPA provide state agencies with additional authority to mitigate or use stipulations on a permit, license, or state-initiated action beyond the agency's permitting, licensing, or state-initiated action statutory or regulatory authority? House Bill No. 473 definitively stated that MEPA is a procedural statute that does not dictate a certain result, but dictates a process. House Bill No. 437 in the 2003 legislative session further articulated that MEPA is procedural by amending MEPA's purpose section to include the following statement: "The Montana Environmental Policy Act is procedural, and it is the legislature's intent that the requirements of parts 1 through 3 of this chapter provide for the adequate review of state actions in order to ensure that environmental attributes are fully considered" (75-1-102(1), MCA).

House Bill No. 459 required that any alternative analyzed under MEPA must be reasonable, that the alternative be

⁵ Those state agencies include the Department of Environmental Quality (DEQ), the Department of Natural Resources and Conservation (DNRC), the Department of Fish, Wildlife, and Parks (FWP), and the Montana Department of Transportation (MDT).

achievable under current technology, and that the alternative be economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor. House Bill No. 459 required that the agency proposing the alternative consult with the project sponsor and give due weight and consideration to the project sponsor's comments. It also provided that a project sponsor could request a review by the appropriate board of an agency's determination regarding the reasonableness of an alternative.

The past 35 years of legislative MEPA activity reveal that the EQC's statutory responsibilities have been substantially increased, the scope of activities subject to MEPA review has been incrementally limited, the Legislature has made it tougher to litigate MEPA cases, the Legislature has clarified that private property considerations should be taken into account, the Legislature has made a policy determination that MEPA is strictly a procedural statute, MEPA documents have statutorily required timeframes, the role of the project sponsor in the MEPA process has been expanded, and MEPA's alternative analysis must be reasonable and economically feasible.

HOW HAVE THE MONTANA COURTS INTERPRETED MEPA?

Over MEPA's 35-year history, the Montana Supreme Court has been called upon to review the Act eight times. The state has prevailed in six out of those eight cases or 75% of the cases.⁶ According to EQC and state agency records, MEPA has been litigated and resolved in the Montana District Courts 23 times and the state has prevailed in 13 of those cases with two split decisions. The total number of MEPA cases resolved by state courts over a 35-year period totals 31. The state's total winning percentage in MEPA cases (the court found in favor of the state), excluding two split decision cases, is 69%. Note that many of MEPA cases also litigate other state laws (constitutional provisions, permitting laws, etc.) in addition to MEPA. Ten out of the 31 MEPA cases, or 32%, have been litigated in the last 10 years (1995 to 2005). According to state legal counsel, there have been a total of 13 MEPA cases that have been dropped or settled over a 35-year period. There are currently six cases involving MEPA issues pending in District Courts and two cases

pending in the Montana Supreme Court. According to the EQC MEPA database, there have been over 36,056 MEPA EIS, EA, and CE actions taken since 1971. Including pending and settled/dropped MEPA cases, 52 of those 36,056 MEPA actions have involved some type of litigation action.⁷

Each MEPA suit has its own cause and effect, but generally, MEPA issues resolved by the state courts can be lumped into two basic categories:

- Should the state agency have conducted a MEPA analysis (EA or EIS)?
- Was the MEPA analysis (EA or EIS) adequate?

The most commonly litigated MEPA issue (20 out of 31 MEPA cases) is whether the state agency should have conducted a MEPA analysis, usually an EIS. The court decisions have been evenly split on this issue, with 10 decisions holding that the agency either need not have conducted a MEPA analysis or was not required to conduct an EIS. Ten court decisions held either that the agency was required to conduct a MEPA analysis or that the agency should have done an EIS.

The second most commonly litigated MEPA issue (9 out of 31 MEPA cases) is whether the state agency's MEPA review (EA or EIS) was adequate. The courts will review the record to determine whether the agency complied with the statute and its own MEPA rules in writing the MEPA review document. Adequacy issues that the courts have reviewed include cumulative impacts, alternatives, cost-benefit analysis, impact analysis generally, and economic impact analysis. Of special note, the issue of cumulative impacts has been litigated in eight cases. The state has been upheld on its analysis of cumulative impacts in six of those eight cases. The issue of adequate alternatives analysis has been litigated in four cases. The courts upheld the adequacy of the state's alternatives analysis in three of those four cases.

Table 2 illustrates those categories of state actions that elicit the most MEPA litigation. State timber sales rank first, and mining and water quality permits rank second in total number of lawsuits, respectively.

⁶ For the purposes of this litigation analysis, a "MEPA case" is defined as litigation in state court in which a state agency is challenged on a MEPA issue and that legal issue is ultimately resolved by the court.

⁷ Obviously, these statistics do not reflect the scope of specific positive or negative impacts (environmental, economic, social, etc.) that each lawsuit may have generated. These statistics also do not take into account the threat of lawsuits over time.

Table 2: Categories of State Action Most Subject to Litigation

State Action	Court-Resolved MEPA Cases	Pending MEPA Lawsuits	Total MEPA Litigation Actions
Timber Sales (State Land)	9	0	9
Mining Permits	5	2	7
Water Quality, Public Water, and Waste Water Permits	2	5	7
Alternative Livestock Ranch/Zoo Menagerie Permits	2	0	2
Air Quality Permits	1	1	2
Facility Siting Certification	2	0	2
Oil and Gas Leases (on State Land)	1	0	1
State Land Grazing Lease	1	0	1
Granting of an Easement on State Land	2	0	2
State Land Development	1	0	1
Subdivision Review	2	0	2
Fishing Access Site	1	0	1
Solid Waste	1	0	1
State Road Construction	1	0	1
TOTAL	31	8	39

In 2000, after an intensive interim study, the EQC concluded that "generally, the MEPA process has resulted in state agencies making legally defensible decisions. It appears that the more complete the environmental document, the more likely the state is to prevail in litigation." The EQC further concluded that the state tends to lose more MEPA cases when the state agency has failed to conduct an EIS. The EQC also noted that "no evidence has been received that the cases were frivolous" and that "there is no information to suggest that legal appeals of agency decisions have not been timely".

WHAT ARE THE COSTS AND BENEFITS OF MEPA?

The EQC's interim study in 2000 attempted to address this question, but couldn't answer it. The study noted that the costs and benefits of any state policy or undertaking usually involve the issue of who or what pays the costs and who or what receives the benefits. The EQC concluded that a retroactive cost-benefit analysis of the MEPA process would be very time consuming and would probably not reveal useful information because of reliance on old and incomplete records, the passage of time, and a lack of institutional memory. Given this finding, the EQC was unable to determine whether the MEPA process has resulted in cost-effective decisions. The EQC noted that prospective information on the costs and benefits of MEPA would be useful in helping future Legislatures, state agencies, and Montanans generally to critically evaluate the effectiveness of MEPA policy and process.

IS THE MEPA PROCESS TIMELY AND EFFICIENT?

The 2000 EQC interim study concluded that "MEPA timeliness can be improved". The EQC found that in reviewing hard-rock mine permits, timber sales, and game farm (alternative livestock ranch) permits, timeliness was an issue in only a small number of activities, but the delays in those small number of significant activities were substantial. The EQC found that project size and complexity, project impacts and their significance, degree of public interest in the project, and presence of an organized project opposition are all factors that significantly contribute to the length of time required to comply with MEPA and the permitting statutes. The EQC noted that frustration over timeliness issues may be because of agency- required mitigation measures contained within an environmental review document. If the permit applicant thinks that the mitigation is unreasonable, the permitting process can be delayed. The EQC further concluded that for most agency projects, permits, and activities, the state agencies do not have a problem meeting statutory deadlines.

In terms of whether the MEPA process was efficient, the EQC concluded that a majority of all state agency MEPA actions are tied to a permitting process. Coordination and efficiency issues are dependent on and intertwined with the permitting process. The EQC recommended that the EQC itself and state agencies should "investigate the possibility of a one-stop-shopping process for permits and the MEPA process. This could improve the efficiency of both the permitting process and the MEPA process."

DOES THE MEPA PROCESS RESULT IN BETTER-INFORMED DECISIONS?

Again, referring to the only comprehensive study conducted on the MEPA process, the EQC found in 2000 that "'yes", the MEPA process is resulting in state agencies ultimately making better decisions". The EQC also noted that "in most cases, the MEPA process results in informed agency decisions. There is no evidence that MEPA results in less information."

WHAT DOES THE FUTURE HOLD FOR MEPA?

Perhaps the most significant finding of the 2000 EQC interim study was that "the MEPA process can be improved". The study went on to make a number of recommendations. I think that future Legislatures will continue to evaluate and modify MEPA. Recently, the environmental provisions of the Montana Constitution have taken center stage in the Montana courts, upstaging MEPA's traditional role at the environmental epicenter of policy debates.⁸ However, there is no question in my mind that MEPA will continue to play a central role in the natural resource and environmental policy debates in Montana and that the Cats Fighting--Not a Musical show will be one of the longest running Montana Broadway shows in history.

⁸ This is a subject for another Interim Back Page article.



INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED, ALL ROOM DESIGNATIONS ARE IN THE CAPITOL

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
December 2005						
				1 Local Government subcommittee Postsecondary Education Policy and Budget subcom- mittee	2 Revenue and Trans- portation Committee, Room 137, 8 a.m.	3
4	5 LFC Resource Indemnity Trust subcommittee, Room 137, 9 p.m. Quality Schools Committee	6 Legislative Finance Committee, Room 137, 1 p.m.	7 Legislative Finance Committee, Room 137, 8 a.m.	8 HB 790 Oil and Gas Study subcom- mittee, Sidney, MT Long-range Building Fund Committee, Room 102, 8:30 a.m. (tentative)	9 HB 790 Oil and Gas Study subcom- mittee, Sidney, MT SJR 38 identity theft work group	10
11	12	13 SJR 11 Subdivision and Platting Act work group, Room 137, 9:30 a.m.	14	15	16	17
18	19	20	21	22	23	24

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
25	26 State Holiday	27	28	29	30	31

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
January 2006						
1	2	3	4	5 HJR 10 fire study work group, Room 137, 10 a.m.	6	7
8	9 SJR 38 identity theft work group	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25 Helping Low-Income Families Succeed training (Children, Families, Health, and Human Services Committee)-- tentative	26 Environmental Quality Council Children, Families, Health and Human Services Committee	27 Environmental Quality Council Children, Families, Health and Human Services Committee	28
29	30	31				

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